ORIGINAL

In the

Supreme Court of the United States

NORMAN A. CARISON, DIRECTOR,
FEDERAL BUREAU OF PRISONS, ET AL.,

PETITIONER,

V.

MARIE GREEN, ADMINISTRATRIX OF THE
ESTATE OF JOSEPH JONES, JR.,

RESPONDENT.

No. 78-1261

Washington, D. C.
January 7, 1980

Pages 1 thru 60

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NORMAN A. CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL., Petitioners,	:	
v.	:	No. 78-1261
MARIE GREEN, ADMINISTRATRIX OF THE ESTATE OF JOSEPH JONES, JR., Respondent.	:	

Washington, D. C.,

Monday, January 7, 1980.

The above-entitled matter came on for oral argument at 11:07 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

KENNETH S. GELLER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Petitioners

MICHAEL E. DEUTSCH, ESQ., Haas, Moore, Schmiedel & Taylor, 343 South Dearborn Street, Chicago, Illinois 60604; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 78-1261, Carlson v. Green.

Mr. Geller, you may proceed whenever you are ready.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. GELLER: Thank you, Mr. Chief Justice, and may it please the Court:

This case arose after respondent's son, Joseph Jones, died in a prison hospital in Terre Haute, Indiana. A year later, the respondent brought suit as administratrix of Jones' estate and as Jones' next of kin alleging that her son's death was the result of grossly inadequate and inappropriate medical treatment in violation of the Eighth Amendment prohibition of cruel and unusual punishment and the due process clause of the Fifth Amendment.

The respondent named as defendants the Director of the Federal Bureau of Prisons, the Warden of the Terre Haute Penitentiary, the Assistant Surgeon General, the Chief Medical Officer of the Terre Haute Prison Hospital, the --

QUESTION: Mr. Geller, perhaps just as an ex-midwesterner, it bothers me -- it is pronounced Terre Haute.

MR. GELLER: Terre Haute. Well, I don't think I intended to say it again, but thank you.

(Laughter)

Also named were --

QUESTION: Now you may.

MR. GELLER: -- a doctor's aide and a hospital guard at the Terre Haute Hospital. All defendants were sued in their individual as well as their official capacities.

The respondent asked for $1.5 million in compensatory damages and $500,000 in punitive damages. The District Court in the Southern District of Indiana held that respondent had sufficiently alleged a cause of action for damages directly under the Eighth Amendment under the theory of this Court's decisions in Bivens and Estelle v. Gamble, but it dismissed the complaint on jurisdictional grounds.

The court held that under the particular facts of this case, Indiana law limited respondent's recovery on account of her son's death to the reasonable hospital medical and burial expenses and expenses of administration. The court held that it was therefore apparent that respondent could not satisfy the $10,000 jurisdictional amount requirement for federal question jurisdiction under 27 U.S.C. 1331.

The Court of Appeals for the Seventh Circuit reversed. The Court of Appeals agreed with the District judge that the respondent had stated a Bivens type cause of action for damages directly under the Eighth Amendment, but it refused to apply the Indiana survival and wrongful death provisions to this case.

The Court of Appeals stated, "Whenever the relevant state survival statute would abate a Bivens type action brought against defendants whose conduct results in death, the federal common law allows survival of the action."

I should add at this point, although I hope to come back to it later, that while it is true that by applying the Indiana survival statutes, respondent's claims would abate, that is because of the federal jurisdictional amount in controversy requirement and not because of any provisions of the Indiana statutes themselves.

Now, the petition in this case presents two independent questions: The first is whether it is proper for the courts to apply a Bivens type cause of action directly under the Eighth Amendment in instances where an existing federal statute, here the Federal Tort Claims Act, provides an adequate federal damages remedy.

The second question, which need only be reached

if the Court disagrees with petitioners' first point and holds that an Eighth Amendment cause of action exists, is whether the Court of Appeals correctly concluded that the survival of respondent Bivens' action is governed by federal common law rather than by the state statutes that apply to analogous cases.

I would like to turn first to the question of implying a constitutional cause of action for damages direclty under the Eighth Amendment cruel and unusual punishment clause in the circumstances of this case.

QUESTION: Mr. Geller, before you do that, do you question federal jurisdiction?

MR. GELLER: Well, if the District Court is correct -- and we believe that it is -- then the $10,000 amount in controversy requirement has not been met. There is jurisdiction if that has been --

QUESTION: I am asking whether the government is questioning federal jurisdiction in the case.

MR. GELLER: Well, we are questioning federal jurisdiction -- we are not questioning federal jurisdiction in the Bell v. Hood sense, but we are saying that --

QUESTION: Are you arguing that there is no jurisdictional --

MR. GELLER: We are arguing that there is no jurisdiction in the federal court because the respondent

cannot reach, recovery cannot reach the $10,000 minimum.

QUESTION: But do you then have to argue or do you that punitive damages are not recoverable?

MR. GELLER: Punitive damages are not recoverable under the Indiana statute.

QUESTION: Then does the jurisdictional issue turn on the Indiana statute?

MR. GELLER: We think it does turn on whether you --

QUESTION: If so, why do you then argue that -- why don't you argue that first then?

MR. GELLER: Well, we don't think you have to -- I would be happy to argue it first, but --

QUESTION: Wouldn't we reach the jurisdictional issue if we --

MR. GELLER: We don't have to --

QUESTION: I am just trying to think it through myself frankly whether we -- under our normal practice we will first decide jurisdiction and then decide cause of action, I suppose. You are arguing cause of action first, I take it?

MR. GELLER: That's correct.

QUESTION: And your second argument is a jurisdictional argument I guess is really what I am asking you.

MR. GELLER: I think it could be phrased that

way because if federal law --

QUESTION: I know it can be phrased that way, but do you phrase it that way?

MR. GELLER: We have not phrased it that way but I think it could be phrased that way in the sense that if state survival law rather than federal common law survival remedy applies, then there is no federal jurisdiction, but that is in some ways just a peculiarity of this case and I didn't want to make the case turn on it and we have argued the question of whether the state or federal survival law should apply to Bivens type actions. But that is an issue that the Court need not reach unless there is a Bivens type action in this case, because if the action should proceed under the Tort Claims Act --

QUESTION: I understand that.

MR. GELLER: -- then there is federal jurisdiction.

QUESTION: Under your presentation, we assume for purposes of reaching the cause of action question that there is federal jurisdiction. Then if we disagree with you on cause of action, we then secondly decide whether we had jurisdiction to decide the first issue.

MR. GELLER: Only in the sense that if you decide on the second issue that state law applies, then

the case drops out because the $10,000 limit jurisdictional amount in controversy limit has not been satisfied. The case could then proceed, however, in state court if the Court were to decide on the first issue, that there is a Bivens cause of action rather than a Federal Tort Claims Act remedy.

QUESTION: Well, is it settled law that punitive damages may not be included in computing the $10,000 jurisdictional amount?

MR. GELLER: If law allows punitive damages to be recovered, then they may be included in determining whether the $10,000 limit has been reached if the complaint states a claim that could fairly lead to the recovery of punitive damages.

However, in this case if Indiana law governs on the question of survival, it is clear that punitive damages can't be recovered because it is not an element of the damages that the statute allows.

QUESTION: Yes, but if it is a Federal Tort Claims action, are punitive damages allowable?

MR. GELLER: No, not under the Federal Tort Claims Act.

QUESTION: In any event, it is not allowable.

MR. GELLER: Well, except that if you proceed under the Tort Claims Act, Mr. Justice White, you don't

have to -- you are not proceeding under section 1331 for jurisdiction and you don't have to meet the $10,000 amount in controversy requirement. You are proceeding under 1346.

QUESTION: Nevertheless you would be arguing that punitive damages, the availability of punitive damages doesn't militate against implying a cause of action.

MR. GELLER: Well, that's correct. That's correct. We don't think you can get punitive damages -- it is clear you can't get punitive damages under the Tort Claims Act, and under the facts of this particular case you can't get punitive damages under the Bivens cause of action because that depends on the peculiarities of Indiana survival law. But that --

QUESTION: I don't know that your brother would agree with you on that.

MR. GELLER: Well, perhaps not but I think the --

QUESTION: I would suppose that he would say that a Bivens cause of action is not limited by the Indiana provisions.

MR. GELLER: Well, his argument is that a Bivens cause of -- the survival of a Bivens cause of action is not limited by state law. But if you reject

that notion and say it is governed by the satate law in this case, I don't think there is any dispute that the Indiana statutes don't allow --

QUESTION: Not if we accept your argument, not if you are right.

MR. GELLER: Only if you accept the argument that state rather than federal law applies. If you accept that argument, then I don't think there is any dispute between the parties that Indiana law doesn't allow for punitive damages in this situation.

Now, it is the petitioner's position that the Court should not create constitutional damage remedies in situations where there exist a statutory remedy available to fully compensate a plaintiff for his injuries. In this case we think there can be little doubt and we do not take the respondent to dispute that respondent's allegations of grossly inadequately or even deliberately indifferent medical mistreatment would state a cuase of action under the Federal Tort Claims Act, and that complete compensatory relief and damages may be obtained under the federal statute.

This Court has already held in United States v. Muniz that medical malpractice claims by federal prisoners are within the FTCA. We think that in these circumstances the Court should remit plaintiffs such as

respondent to that existing federal statutory remedy, rather than creating a remedy themselves.

QUESTION: Did the government raise this point before the Seventh Circuit?

MR. GELLER: No, Mr. Justice Rehnquist, the government did not. We have stated as much in Footnote 9 of our brief.

QUESTION: Nor in the District Court?

MR. GELLER: That's correct. We acknowledge that the Court has a rule that it will not normally consider issues not raised below, but that is not an inflexible or absolute rule and we have put forward certain considerations in Footnote 9 which we think should lead the Court in this case to confront the issue.

I should also add that respondents have joined us in this suggested, they have not asked that the Court dismiss the writ as improvidently granted and therefore to the extent that the Court's rule is based on notions of fairness to the adverse party, not having new arguments made that the adverse party has not had the chance to confront, we don't think those considerations apply here. But we acknowledge and we acknowledge the first opportunity we had after we learned of it that this precise issue was not presented in the Seventh Circuit.

QUESTION: The fact that it wasn't presented

wouldn't necessarily lead to the dismissal of the writ as improperly granted.

MR. GELLER: Well, as to the first question, it might perhaps. I mean the court has a rule that it will not normally consider issues that were not raised below. It is our position that that is a flexible rule but should not be applied in this case. We did raise the second question unquestionably in the Seventh Circuit and the Seventh Circuit reached the issue, and that is properly here.

QUESTION: That is properly here.

MR. GELLER: That's correct. That is correct.

Now, I think that the principal difference between the respondent and the petitioners on this point is that respondent maintains that Bivens actions for damages are a matter of "constitutional compulsion," and that federal courts are automatically obliged to imply such causes of action at least in the absence of an affirmative and unequivocal statement by Congress that it intends to make the particular statutory remedy exclusive.

We believe, on the other hand, that implication of constitutional causes of action for damages are not compelled but rather are, as Justice Powell stated last term in Davis v. Passman, the matter of principal judicial discretion and that courts must take into account a number

of considerations including the availability of statutory relief in determining whether to exercise that discretion.

Now, the petitioner's position on this point is supported we believe by the very language of Bivens itself. The Court's opinion in that case and Justice Harlan's concurring opinion each stressed that in the absence of a Fourth Amendment cause of action for damages the plaintiff would have had no effective means of redressing the official wrongs he suffered.

Indeed, Justice Harlan specifically mentioned that Congress had refused to waive the government's immunity from suit for torts such as the one the plaintiff in that case had alleged. Where, however, there is, in the Court's words, another equally effective remedy, the Court strongly suggested in Bivens that the judiciary ought to refrain from formulating an additional cause of action --

QUESTION: Didn't the Court refer to some explicit congressional directive?

MR. GELLER: I think the explicitness came in, explicit direction that there not be a cause of action for damages, but I don't -- and here there is in fact an explicit statutory remedy, so the explicit --

QUESTION: I know, but no explicit statutory directive that it be exclusive.

MR. GELLER: No, I don't think that the Court discussed explicitness in the sense of exclusivity, Mr. Justice White. I think when the question is whether a statute should be exclusive, I think the Court properly must look to Congress for the answer.

QUESTION: Was not Tort Claims Act exclusive in the sense that no such remedy was available until 1946 when the Act was passed?

MR. GELLER: That's correct, and no remedy for intentional torts of the type involved in the Bivens case was available until 1974.

QUESTION: That is, against the United States.

MR. GELLER: Against the United States.

QUESTION: The Bivens case was not against the United States.

MR. GELLER: No, that's true, it was against the individual officer, although that was not until 1971. But I think it is significant that every time --

QUESTION: Nor is this case against the United States.

MR. GELLER: No, this case is against several officers of the United States. I think it is significant that every time since Bivens that the Court has had occasion to confront the Bivens issue, in Brown v. General Services Administration, in Butz v. Economou, and in Davis

v. Passman, it is repeated the suggestion in Bivens that it neither create or extend the constitutional right of action for damages where there is an existing statutory remedy.

In fact, in Davis itself the Court stated in at least five separate places in the opinion that plaintiff had no other federal damages remedy available to her and therefore that the Fifth Amendment should provide one.

Therefore, if the Tort Claims Act is as we believe an adequate substitute for a Bivens claim such as the one respondent has alleged under the Eighth Amendment, we think that this Court's prior decisions lead to the conclusion that the statutory remedy alone should be pursued.

I would like to turn then to respondent's argument that the Tort Claims Act is not an act which substitutes for an Eighth Amendment Bivens action. Now, the respondent has catalogued a number of differences between the two types of actions, but in our view the relevant question is not whether the Tort Claims Act constitutes a remedy identical in every respect to that provided in Bivens, but rather whether the federal statute can adequately and fully compensate for victims of unlawful government conduct such as that alleged in respondent's complaint.

We think that the answer to that question is plainly yes. The Court remarks in Carey v. Piphus that the primary purpose of a constitutional damages action is to provide monetary compensation to a plaintiff for his injuries. As I mentioned earlier, the Tort Claims Act unquestionably covers medical malpractice in actions brought by federal prisoners, and in light of the 1974 amendments it also now covers intentional torts by law enforcement officers such as employees of the Bureau of Prisons.

QUESTION: But it does also, as you told us, cover negligence actions, doesn't it?

MR. GELLER: No, it says negligence or other wrongful act or omission, I believe.

QUESTION: Right.

MR. GELLER: It is not limited to negligence.

QUESTION: No, it is not but it does -- it is brought enough to encompass and certainly does encompass negligence.

MR. GELLER: Absolutely, yes, and that was the --

QUESTION: And that was the query, whether a constitutional claim under the Eighth Amendment would.

MR. GELLER: Excuse me?

QUESTION: Perhaps it is questionable, is it

not, whether a claim under the Eighth and Fourteenth Amendments would recover negligent wrongs.

MR. GELLER: I think under Estelle v. Gamble it is clear that negligence wouldn't fall under the Eighth Amendment, there has to be some allegation as there is I think in this complaint of gross negligence.

QUESTION: Historically hasn't the Eighth Amendment contemplated intentional cruel and unusual conduct?

MR. GELLER: Historically I think that is correct, although in Estelle v. Gamble the Court said it is addressed to the wanton, senseless infliction of pain which normally one would think would be intentional. There is an allegation in one of the latter clauses of the complaint in this case of intent, but if you go down the complaint it really states a claim essentially for gross negligence. The complaint is reprinted in the appendix, essentially at pages 10 and 11, there are allegations of not giving proper medication, inadequate staffing of the hospital, use of a faulty respirator, use of a wrong drug, lack of --

QUESTION: How about page 13 of the appendix, count 4, apparently paragraph 87 -- I gather all of the paragraphs have been reprinted.

MR. GELLER: Yes.

QUESTION: "The above alleged actions of the defendants were of a malicious and intentional nature and manifest a deliberate indifference of requests for essential treatment."

MR. GELLER: That was the paragraph to which I referred a moment ago, Mr. Justice Rehnquist, saying that at the very end in the final count there is an allegation which incorporates all the previous allegations and essentially says in conclusory language that they were done maliciously and intentionally. But if you go through the key portions of the complaint, which are paragraphs 1 through 18, there are allegations of gross negligence, negligence albeit of a gross nature. It seems to us clear that if the events that occurred in this case had not occurred in a prison hospital with federal doctors but they had occurred in a private hospital with a private patient, the same exact events, there would be no question that what would be brought is a tort suit under a state negligence law, a malpractice law, and there would be fully adequate remedy available to compensate the plaintiff for his injuries. There is no allegation here that Indiana law is in any way deficient in allowing a plaintiff to recover if he has been the victim of malpractice such as has been alleged on pages 10 and 11 of this complaint.

But the respondent nonetheless points to a number of features of the Tort Claims Act suit that she claims makes the statutory remedy wholly inadequate. First, she notes that the Tort Claims Act has an administrative exhaustion procedure and that jury trials are not available, but these differences we think really relate to the procedures of adjudication and not to the fairness or completeness of the compensation that may ultimately be awarded to a successful litigant. And I might add that the same restrictions involving exhaustion of remedies and the absence of a jury trial are present under Title VII of the Civil Rights Act, yet the Court in Brown v. General Services Administration held that Title VII is an adequate substitute for a Bivens action and for other statutory remedies challenging racial discrimination under the Fifth Amendment.

QUESTION: Didn't the Court in Brown infer an intent to make the remedy exclusive?

MR. GELLER: An intent on the part of Economou to make the remedy exclusive of other statutes, that's correct. There is no --

QUESTION: Well, there was a proof of remedy basis that --

MR. GELLER: That's correct, but --

QUESTION: You don't argu that there is any

such intent here, do you? There is no such evidence of a similar congressional intent, is there?

MR. GELLER: No, there isn't. There isn't, although we don't think that that is necessary. The cause of action, the Bivens cause of action was not created by Congress, it was created --

QUESTION: My question is only directed to your reliance on the Brown case.

MR. GELLER: Well, in Brown there was no separate discussion in the Court's opinion of the Fifth Amendment claim. The Court certainly did not say that the fact that Congress meant to make Title VII exclusive of other statutory remedies means that it should also be exclusive of a constitutional remedy, although there was a constitutional claim in Brown directly, a Bivens claim directly under the Fifth Amendment.

QUESTION: Well, Congress may have intended to make it exclusive of the constitutional claim and then the question might be whether or not it could, whether or not it could.

MR. GELLER: That's correct.

QUESTION: Nonetheless, it might well have intended to and I think, as I remember Brown -- I wrote it -- I think I wrote that Congress intended to do so.

MR. GELLER: Intended to make it exclusive of

other statutory --

QUESTION: Exclusive remedy --

MR. GELLER: That's right.

QUESTION: -- exclusive of all other statutory and constitutional claims.

MR. GELLER: Well, the word "constitutional" does not appear I believe in the opinion, but the Court clearly made it clear in Brown that Congress did intend to make Title VII exclusive remedy for racial discrimination in employment.

QUESTION: Right.

MR. GELLER: There is no similar legislative history here with regard to Eighth Amendment Bivens claims because the Tort Claims Act was, of course, passed well before this Court's decision in Bivens.

Similarly, the fact that the Tort Claims Act recognizes certain defenses, such as the due care defense, does not destroy the effectiveness of the remedy because these defenses are essentially equivalent we think to the qualified immunity defense that would be available to a federal officer in a Bivens action.

Finally, the respondent stresses the fact that punitive damages are not available under the Tort Claims Act, but punitive damages are not a form of compensation and, as the Court held last term in the Faust case, they

are not an essential attribute of an effective remedial scheme.

Moreover, while deterrence of official misconduct is certainly an important goal, compensatory damages serve to achieve that goal we think to a large extent.

QUESTION: Well, Mr. Geller, what do you do about that Senate committee report, or do I just misread it, as recognizing in 1974 certain intentional torts? The report seems to think that it just adds another remedy rather than eliminating what might have been an existing Bivens --

QUESTION: Well, I think there are a number of things that can be said about the '74 Senate report.

QUESTION: Give it your best shot.

MR. GELLER: I will. The first thing that can be said is that the Senate report was obviously referring to Fourth Amendment Bivens actions which, of course, at that time the only type of Bivens action this Court had recognized. And in Bivens the Court said that tort remedies were not an effective means of dealing with Fourth Amendment violations because frequently state tort law was inconsistent with or even hostile to the interests that --

QUESTION: So you would say at least that even though the Federal Tort Claims Act would give remedy for

some constitutional torts, it wouldn't necessarily preempt implying a constitutional cause of action?

MR. GELLER: Yes.

QUESTION: In those cases.

MR. GELLER: Yes, I think that first of all the Senate report was only thinking about Fourth Amendment actions and I think it is clear that to the extent we can read anything into this one sentence in the Senate report as being congressional intent, that they did not want --

QUESTION: It is pretty clear that whatever kinds of causes of action they were talking about --

MR. GELLER: Yes.

QUESTION: -- there would be parallel remedies there.

MR. GELLER: The focus there was obviously on the tort claim remedy that they were establishing at the time under section 2680(h) for intentional torts.

QUESTION: So at least Congress was recognizing that the existence, the mere existence of a tort claims remedy would not bar Bivens type remedy.

MR. GELLER: I think that is correct. However, the --

QUESTION: Well, isn't that what you are arguing -- you are just arguing the reverse now.

MR. GELLER: No, no, no. We are arguing that

you needn't look to congressional intent, that the Bivens action is a creation of this Court and that the Court hasn't decided for itself whether there are adequate statutory remedies available since --

QUESTION: Well, assume it was a kind of cause of action that you say the Senate report was talking about, you say we wouldn't look to congressional intent?

MR. GELLER: I think it would be one factor. After all --

QUESTION: We could if we wanted to just say, sorry, Congress --

MR. GELLER: I don't think there is any question that the Court could. It may not be wise, but if Congress wants to create a Bivens cause of action it can easily do so.

Now, the other thing to be said about the 1974 Senate report, Mr. Justice White, is that there is clearly the suggestion, at least the understanding on the part of the author of the report that Bivens was a constitutionally compelled remedy, because on the same page of the Senate report on which the sentence appears that you just read, there is the statement that in Bivens the Court held that the Fourth Amendment requires the availability of a damages action.

Now, to the extent that Congress thought that

Bivens actions were constitutionally required and that Congress couldn't abrogate them even if it wanted to, I think the statement in the Senate report is merely an attempt to avoid what might be viewed by some legislators as a possible constitutional problem if it were thought that the 2680(h) remedy was intended to abrogate the Bivens action.

But once again we are not dealing with the 2688 claim here, it is not a tort such as Congress allowed to be pursued under the Tort Claims Act for the first time in 1974, it is a negligence action which has always existed under the Tort Claims Act and there is certainly no reason to believe that Congress thought that the state laws which were incorporated in the Tort Claims Act for negligence or medical malpractice albeit of an egregious kind, was not an adequate remedy and that therefore Bivens actions would have to continue to be recognized despite the adequacy of the statutory remedy.

QUESTION: I thought when Mr. Justice Rehnquist put the question to you, that you conceded, as I think you must, that the complaint covers more in negligence action.

MR. GELLER: I think there is a sentence at the very end that says that these were intentional torts, but we think in light of the 1974 amendment to the Tort Claims

Act even intentional torts by law enforcement officers which employees of the Bureau of Prisons are would now be covered by the Tort Claims Act. So even if this were construed to be an action for battery, for example, it would be compensable under the Tort Claims Act and once again we think there is no need for this Court to allow a constitutionally based --

QUESTION: Are there any cases that construe the '74 amendments to include prison guards and officers?

MR. GELLER: Well, there is one case in the Southern District of New York --

QUESTION: These are law enforcement officers?

MR. GELLER: Yes. There is no question that employees of the Bureau of Prisons are law enforcement officers by virtue of I think it is 18 U.S.C. 3050 and that their intentional torts can be the subject of a Tort Claims Act suit under section 2680(h).

I would like to reserve the balance of my time.

QUESTION: But you sue the government there, you don't --

MR. GELLER: That's correct.

QUESTION: Suit against the individual is barred.

MR. GELLER: Suit under 2680(h) is against the government, that's correct.

MR. CHIEF JUSTICE BURGER: Mr. Deutsch.

ORAL ARGUMENT OF MICHAEL E. DEUTSCH, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. DEUTSCH: Mr. Chief Justice, and may it please the Court: My name is Michael Deutsch, and I am the attorney for the respondent in this case.

The government urges before this Court two related theories which would provide no remedy at all for the decedent in this case, despite the serious deprivations of the Bill of Rights that he has suffered.

It is imperative that the Court properly understand the claims that we brought here. We brought a claim for deliberate indifference to serious medical needs causing death. This Court in Estelle v. Gamble held that that claim in that language, and the District Court found it and the Court of Appeals found it, created an Eighth Amendment violation for cruel and unusual punishment. It recognized that this man, Joseph Jones, was in the custody of the government. He could not walk down the street and get medical care, he had to rely on the government to give him that medical care. And when he went out to a private hospital and the doctor there said transfer this man to another prison because he had asthma and the government ignored that, and when the doctor of the private hospital said give this man medication for his asthma and the government ignored that, and when the man predictably had

a serious asthma attack and when he went to the hospital for eight hours no doctor from the Bureau of Prisons came to see him, and when the respirator didn't work, even though they knew for two weeks that it wasn't working, and when they gave him Thorazine which killed him, and that hospital, even though Thorazine is clearly contra-indicated for asthma -- we say that is cruel and unusual punishment.

And what Justice Marshall said in Estelle, in the worst cases it causes torture and lingering death, and that is what Joseph Jones suffered and that is what we allege and that is what the courts below found, based on the truth of the allegations in our complaint as the court must take them to be true.

And we also claim that the government deprived him of life without due process of law, a Fifth Amendment claim. Clearly it is recognized as one under the Fifth Amendment, as well as that deprivation was caused by racial animus, another equal protection component of the Fifth Amendment.

We do not allege medical malpractice. We do not allege battery. We do not allege any tort or any negligence theory. We come here and we have come to the federal court with a violation of a fundamental protection of the Bill of Rights against federal officers in a federal

prison.

Now, I ask you, why doesn't Bivens apply to that claim? Is not the Eighth and the Fifth Amendment an independent limitation on the power of the federal government? Isn't that what Bivens said? Are there any special factors counseling hesitation in this case? Has Congress explicitly said that Joe Jones should not get damages? Is it --

QUESTION: Suppose the federal tort claims remedy was coextensive with whatever constitutional remedy you could obtain, would you think that would be a factor that the Court should take into account in determining whether in any specific case a constitutional cause of action should be implied? It isn't a question of whether the Tort Claims Act is exclusive. It is a question of whether --

MR. DEUTSCH: It is equally effective, Judge.

QUESTION: Well, it is a question of whether in managing a judicially created cause of action it should make a difference whether there is an adequate remedy elsewhere.

MR. DEUTSCH: I agree, it is a question of whether there is an equally effective remedy for the constitutional deprivation that Joe Jones --

QUESTION: Well, if there was an adequate

remedy elsewhere, you just say you wouldn't be here anyway, you wouldn't be wasting your time then.

MR. DEUTSCH: We wouldn't need to, we would have an equally effective remedy for the deprivation of constitutional rights. Why would we come?

QUESTION: Let's assume that the statute of limitations, suppose you hadn't complied with the Federal Tort Claims Act.

MR. DEUTSCH: I would think that that would be appropriate basis for the Court to say otherwise the statutory scheme was equally effective and we wouldn't have anything to argue about.

QUESTION: So it comes down here to whether or not the differences between the remedies are sufficient that the constitutional cause of action should exist anyway.

MR. DEUTSCH: Yes, but it really gets to a fundamental question of what the purpose of the Tort Claims Act is and how it operates. It is not only the specific regulations in the act, it is the whole ideology behind the act. The act itself makes you go to state law to fill in all the aspects of your claim. You go to state law to determine your cause of action, you go to state law to determine your damages, you go to state law to determine whether the claim is --

QUESTION: You just say that the Federal Tort Claims Act could never be a decent remedy then?

MR. DEUTSCH: I would say that for a constitutional violation it is never an equally effective remedy, no, sir.

QUESTION: Well, the Seventh Circuit said that many courts of appeals had in Bivens types of actions looked to state law for statutes of limitations principles and that sort of thing, so that the Federal Tort Claims Act isn't peculiar in borrowing state law when it is necessary.

MR. DEUTSCH: Well, you can look to state law to facilitate the policies behind the constitutional right, but if the state law is inconsistent or hostile you don't have to apply it. In the Tort Claims Act, you have to apply it whether or not it totally wipes out your claim.

In our case, if we apply the Indiana state law of survival, we have no claim. Joe Jones is dead but he doesn't have a claim at all. That is not facilitating the principles of the Constitution.

QUESTION: Are you saying then that the borrowing under a Bivens type of a claim, say of a statute of limitations, you necessarily borrow the longest possible ones because that "facilitates the claim," whereas if you borrow a shorter statute of limitation it is "hostile" to

the claim?

MR. DEUTSCH: Well, wait a minute. The statute of limitations I would maintain is a different question because the statute of limitations, you are suppose to bring to a case, you don't bring it and you are out, your case is dismissed because of some kind of laches theory. Now, if it is two years --

QUESTION: But that is hostile to your constitutional claim.

MR. DEUTSCH: Well, it is hostile but the litigant could have brought the claim within a certain period of time and didn't. I am talking about hostility where it wipes the claim out. Joe Jones could never bring a claim for survival because Indiana law wipes it out. That is hostility. The statute of limitations is not a kind of hostile state provision that --

QUESTION: What is there that requires survival? Survival is a matter of statute, isn't it?

QUESTION: That is why I took Lord Campbell's act to --

QUESTION: There wasn't any survival until Lord Campbell's act, was there?

MR. DEUTSCH: Well, yes, but now I would suggest to the Court, as the Court found in Moragne, which created a federal common law wrongful death, but most

statutes have survival.

QUESTION: Yes, but it is a matter of statute.

MR. DEUTSCH: Yes, it is, Judge, but if you look to the state statute and that statute is hostile to your right to collect, deprivation of life, if the statute wipes that out then your Fifth Amendment right is meaningless.

QUESTION: Since you and I agree that it is a matter of statute, what is there in the Constitution that guarantees survival?

MR. DEUTSCH: There is nothing in --

QUESTION: Why is it hostile to the Constitution not to have survival?

MR. DEUTSCH: It is not a question of whether it is hostile to the Constitution, it is a question of whether when you are dealing with the federal constitutional right and a federal enclave against federal individuals, and you look to state law and the state law is inconsistent and hostile, whether or not you apply federal common law -- that is what Judge Swygert did in the Seventh Circuit opinion, that is the question that is left open by Robertson v. Wegmann, which says if the person dies as a result of a constitutional deprivation claim, you have to facilitate that right. You can't look to state law when there is no state interest involved and it will wipe

out that right.

QUESTION: Mr. Deutsch, can I ask you a question about this hostile Indiana statute. As I remember it, it does two things: It says the claim survives, but it says that the only damages that can be recovered are burial expenses and hospital expenses.

MR. DEUTSCH: No, Judge.

QUESTION: Isn't that right?

MR. DEUTSCH: No. There are two statutes --

QUESTION: It is the wrongful death.

MR. DEUTSCH: It is the wrongful death statute. The --

QUESTION: And the survival statute --

MR. DEUTSCH: The survival statute which says if you die as a result of the constitutional claim, it does not survive, nobody recovers.

QUESTION: The state doesn't say anything about a constitutional claim.

MR. DEUTSCH: No. No. It is a state law. It is dealing with the state interests.

QUESTION: If you die as a result of the alleged wrong.

MR. DEUTSCH: Right, if you die as a result of the alleged wrong, right. In addition, there is a wrongful death statute which says that if a --

QUESTION: Before you leave that, for just a minute, what was Judge Nolan, what was he -- he is, of course, an Indiana judge -- what was his rationale for his decision?

MR. DEUTSCH: He applied both the wrongful death and the survival statute --

QUESTION: He concluded, did he not, that as a matter of Indiana law the claim survived but the only damages recoverable were hospital expenses and burial expenses and they didn't come to $10,000.

MR. DEUTSCH: Because he applied the wrongful death statute. We --

QUESTION: He concluded as a matter of Indiana law that the claim survived.

MR. DEUTSCH: Right, he did.

QUESTION: Right.

MR. DEUTSCH: He assumed that he was bound by Indiana law, he had to apply Indiana law.

QUESTION: But in construing Indiana law, he found survivorship.

MR. DEUTSCH: He found --

QUESTION: And then he said the damages recoverable as a matter of Indiana law don't reach $10,000.

MR. DEUTSCH: That's correct.

QUESTION: Now, my question to you is is it not

possible that you have separate questions, one, does the action survive, and, secondly, if so what damages are recoverable. And I suggest to you that possibly the first question might be a matter of state law and the second question might be a matter of federal law.

MR. DEUTSCH: Well, if the action does survive and the question is one of damages and it does survive for Joseph Jones and then damages is a question, as Justice White said in his dissent in Jones v. Hildebran, a question of federal common law, and don't apply the limitations, that would be fine because you would be fashioning a remedy which would facilitate the interests of the constitutional rights that Joe Jones brings. The idea is to facilitate those interests. It is not to cut it off.

QUESTION: On the other, Judge Nolan may have been wrong as a matter of federal law in saying that you look to state law for survivorship but right as a matter of federal law in determining the elements of damage.

MR. DEUTSCH: Well, I would --

QUESTION: In which case you would lose.

MR. DEUTSCH: Yes, but I would suggest that Judge Nolan would be wrong in that because it wipes out the claim that is brought for the violation of the constitutional right. For example --

QUESTION: Do you concede that Judge Nolan was

correct if in Indiana law applied as to --

MR. DEUTSCH: No, because we didn't bring a claim for wrongful death. This is Joseph Jones' estate. The claim is for the deprivation of violation of Joseph Jones' constitutional rights. Wrongful death is when the survivors bring a claim for the violation of their own rights.

QUESTION: Then you say Judge Nolan was wrong as of Indiana law?

MR. DEUTSCH: Yes, and Justice Swygert found so, he clearly found so, and Justice Swygert is a Justice from Indiana, he knows the Indiana law just as well as Judge Nolan.

QUESTION: Better, you say.

MR. DEUTSCH: I do.

QUESTION: The United States says in its brief, under Indiana law all causes of action survive.

MR. DEUTSCH: That's false. That is absolutely false. If the Court carefully reads the survival statute and the wrongful death statute in Justice Swygert's opinion, it will be clear that there is no survival statute at all for claims where you die as a result of them.

QUESTION: I think there are two Indiana judges on the panel, Judge Grant was also from Indiana.

MR. DEUTSCH: That's right, Judge. I want to stress this point about the Federal Tort Claims Act because I --

QUESTION: None in the Solicitor General's office, I take it.

MR. DEUTSCH: Probably not. The Federal Tort Claims Act contention that the government makes here is so groundless and so specious that it is important for the Court to really focus on because it is the very same claim that Bivens made before this Court and it was rejected.

What did Bivens say? Bivens said that -- the government said in Bivens that this man has a cause of action in state tort law, he should bring it there and it should be like two private parties suing each other. The Court rejected that. They said that it should be limited to state tort remedies.

They say here and in Bivens that the government conceded that every time someone sued in state court under that theory they would lose the court to federal court. So you have got a case under state tort law being litigated in federal court. That is what the Court rejected in Bivens.

Here we got a case of federal court under the Tort Claims Act, we have to apply state law on every

single substantive issue and procedural issue. Justice Blackmun, in his dissenting opinion in Robertson v. Wegmann, specifically said that the state tort law policy is not sufficient to protect the rights of disfavored groups. The Court in Monroe v. Pape, in Bivens, in Davis have consistently said state tort law is insufficient here. That is the whole purpose of the Civil Rights Act, and we are not going to say that to make stronger protections for state officials' violations of rights rather than federal officials --

QUESTION: Suppose we agree with you with respect to the Tort Claims Act, that it doesn't -- it isn't preclusive here. What do you do about Robertson v. WEgmann?

MR. DEUTSCH: I would suggest to the Court that --

QUESTION: You just say that here it is hostile and there it wasn't?

MR. DEUTSCH: Yes, that is the very question that was left open in Robertson. It said we don't have -- we are not talking about a specific abatement case in one case, which happens here. We are talking about general hostility because no case survives. Specifically, what the case in Robertson v. Wegmann left open is if the person dies as a result of the unconstitutional action, the Court

said we are not holding that that claim would survive because what about the policies of deterrence and compensation.

QUESTION: So if Indiana law says no survivorship unless you leave a spouse, I suppse you wouldn't be here.

MR. DEUTSCH: No, no. That is --

QUESTION: Well, what about Robertson v. Wegmann?

MR. DEUTSCH: I would say first of all that -- are you saying a spouse to bring the action in the main in a survival case?

QUESTION: In a survival case.

MR. DEUTSCH: No, I would say that that would be too restrictive and too inhospitable to facilitate -- I don't even think you have to go to Indiana law.

QUESTION: Well, that is what --

MR. DEUTSCH: First of all, Robertson was a case against state court officials and 1988 said you have to go to Indiana law. We don't have any state interests here. As I said, we have federal defendants, we have a federal enclave, we have federal constitutional rights and a federal prisoner. The only --

QUESTION: And yet you concede that the state statute of limitations would be governing, don't you?

MR. DEUTSCH: I don't concede it, Judge, but I can make a difference between a statute of limitations and a survival statute that precludes all claims.

QUESTION: Well, do you say that the survival statute would have to enable collateral relatives to bring the action?

MR. DEUTSCH: The purpose of a survival statute is --

QUESTION: Do you or don't you?

MR. DEUTSCH: Yes, you bring it in the name -- it is for a constitutional deprivation to the person that died. It doesn't matter who brings it.

QUESTION: Then do you say it would also have to permit the state of Indiana to bring it under the law of escheat --

MR. DEUTSCH: No, no. Then there is no interest if the federal government gives money and it goes to the state, that doesn't make any sense. But we are talking about the constitutional violations to Joe Jones. His estate is bringing it. The damages are measured by the damages to him, not the damages to his wife. And I would point out to the Court that Joe Jones has a mother, has a father, has a sister and has a brother. It is not like he has nobody that would take from his estate, and why shouldn't he be able to collect from his estate?

QUESTION: In my brother White's hypothetical case, that is an Indiana statute that says there shall be survival of an action if there is a surviving widow and only if there is a surviving widow, would the adequacy of the state remedy depend upon whether or not there were a surviving widow?

MR. DEUTSCH: Yes, Judge. If you would say you had to go to state law --

QUESTION: No, no, under your submission, not what I would --

MR. DEUTSCH: Well, I would say you shouldn't go to state law unless it facilitates the interests involved.

QUESTION: In that case it would facilitate the interests involved if I understand your argument.

MR. DEUTSCH: Not if the claim abated, it wouldn't, if he didn't have a wife --

QUESTION: There would be survivorship if there were a widow and in this case there is a widow.

MR. DEUTSCH: No, I'm sorry, Judge, there is a mother --

QUESTION: No, no, in this hypothetical case there is a widow.

MR. DEUTSCH: I see, yes, there would be --

QUESTION: So it would all depend upon whether

or not there were a widow.

MR. DEUTSCH: Right. If there were a widow in the case, it would not abate, then I would say the state law could facilitate the interests, yes.

QUESTION: If not, then you would have to go under a Bivens claim.

MR. DEUTSCH: No, not a Bivens claim, a federal common law of survivorship. The Bivens claims --

QUESTION: Where does this common law of survivorship come from?

MR. DEUTSCH: It comes from the --

QUESTION: You and I were dealing with statutory, didn't we?

MR. DEUTSCH: I am saying if there is no state law that facilitates the interests, that federal --

QUESTION: At common law, there was no survivorship?

MR. DEUTSCH: Right.

QUESWTION: Do you agree with that?

MR. DEUTSCH: Yes.

QUESTION: So how can there be a common law of survivorship?

MR. DEUTSCH: Because as the Court did in Moragne, the Supreme Court case about --

QUESTION: That was an admiralty case.

MR. DEUTSCH: That's right. It looked at all the state laws and it said --

QUESTION: And statutes.

MR. DEUTSCH: -- and statutes -- and it said there now has become a common law of suvival and we are going to fashion a federal common law of survival.

QUESTION: That wasn't common law, was it?

MR. DEUTSCH: Pardon?

QUESTION: That was not common law, it was admiralty law, wasn't it?

MR. DEUTSCH: Yes, but they fashioned a remedy of --

QUESTION: As a matter of admiralty law.

MR. DEUTSCH: Well, as a matter of federal common law. It was an admiralty case, but it was certainly not a --

QUESTION: No, there is a difference between admiralty law and common law, isn't there? I always felt there was.

MR. DEUTSCH: Well, there can be common law remedies in admiralty cases. There are common law structures that promote the admiralty interests.

QUESTION: Can you name one?

QUESTION: For years, in admiralty, you didn't have lawyers, you had proctors. That was up until about

five years ago. Or don't you want to recognize that distinction?

MR. DEUTSCH: Well, from that case, from the Moragne case, several other courts of appeals have fashioned federal common law of suvival in cases similar to this. They use that case as a basis. I recognize that admiralty is different.

I would just say to the Court, once you get beyond the fact that you are applying in Tort Claims Act state law in every instance, state law in all of the substantive issues. Then you look at the act itself, and we are talking about constitutional rights here. Why should he file a medical malpractice case when he has got an Eighth Amendment claim? They make you take that claim and put it forward as a medical malpractice case, he can't get a jury trial, and I would suggest that when we are talking about the enforcement of civil rights it is necessary that you involve the public in that, a jury trial is afforded to a Bivens plaintiff. The immunities, there are extra immunities under the Tort Claims Act. For example, there is a discretionary immunity which this Court specifically rejected in Butz. First of all, you immunize all federal individual officers. They are immunized. Then the government in addition is immunized for all discretionary activities that they did. All higher-up officials are

immunzied under 2680(a). So that is an additional immunity and it is a good faith immunity.

There is no punitive damages. We are talking about enforcing a constitutional right, compensation and deterrence, compensation and punishment, are fundamental, have always been fundamental.

QUESTION: Has there ever been a holding by this Court that a Bivens type action necessarily requires the allowance of punitive damages?

MR. DEUTSCH: No, there hasn't. Carey v. Piphus, which is a 1983 case, leaves that open. I would suggest to the Court, if you are talking about a case like this, where a man in prison had no other alternative but wait for his medical care and he never got even the most basic medical care, there has to be some deterrence. And what is the ramifications of going under the Tort Claims Act to other constitutional deprivations --

QUESTION: Under the deterrence rationale, of course, you have got a lot of different defendants here, would you suggest that punitive damages is appropriate against Norman Carlson, for example, the Director of Prisons?

MR. DEUTSCH: I would. He was specifically placed there -- this is the fourth person, fourth prisoner at Terre Haute Prison to die.

QUESTION: I suppose you could equally claim them from the Attorney General of the United States.

MR. DEUTSCH: No, no.

QUESTION: He was in the custody of the Attorney General.

MR. DEUTSCH: Normal Carlson was specifically called, there were letters written to him, there was a protest --

QUESTION: I see, it is based on specific contact.

MR. DEUTSCH: Oh, yes. I'm not talking the respondents' superior on any of this.

QUESTION: I see.

MR. DEUTSCH: Normal Carlson is specifically involved in the facts of this case. The doctor who did nothing is involved. I would suggest maybe there would be punitive damages for the staff man who was left in the hospital for eight hours and no doctor came while a man died in his hands. But certainly the higher ups, deterrence is necessary. Four prisoners died at Terre Haute Prison in a space of eight months from grossly wanton negligence in medical care, not negligence, Eighth Amendment crual and unusual punishment. What perfect situation is there for deterrence to get them to change the medical care that exists at their prison.

If you tell us that we have no claim under the

Constitution, where are there going to be changes? What remedy does Joe Jones have other than damages in this case?

QUESTION: Don't you think that there is some deterrence factor that if this were a Federal Tort Claims Act case and there were repeated gross negligence shown that the deterrent would be the discipline and perhaps dismissal of all the people involved?

MR. DEUTSCH: Judge, that would be good. That would be a deterrence, but the Tort Claims Act is completely silent on any disciplinary mechanism against the individual who is responsible for the action. Very interestingly --

QUESTION: But you must be aware -- perhaps you are not -- that sometimes military medical men have been dismissed from the service after a Federal Tort Claims case disclosed their negligent conduct.

MR. DEUTSCH: That would be fine if that happened, but first of all we wouldn't even have a claim under the Tort Claims Act in this case because our claim would abate because we would have to apply state law. So there would be no deterrence in Indiana under the Tort Claims Act to anyone. In Indiana, you had better kill then rather than injure them because you are better off.

QUESTION: Do you have a suit under Indiana law at all? Let's assume the man hadn't died, would you have a suit?

MR. DUETSCH: Yes, but under Indiana -- Indiana has an Indiana Medical Malpractice Act, so we would have to convene a board of doctors first and we would have to present our claim to the doctors, which we would still have to do maybe under the Tort Claims Act because we have to apply the law of the place, and then we would have a limitation, a monetary limitation on the amount of recovery.

We are caught in the vagaries of state law, the limitations, the insufficiencies, and we are talking about fundamental Bill of Rights, the protections of the Bill of Rights to federal victims, victims of offenses of federal officials.

Right now, Justice Burger, the government, the Executive Department of the government, since 1973, has been trying to get the Tort Claims Act to be the exclusive remedy. There have been three bills in Congress, Congress has rejected them, and in order to get it passed the government has made substantial concessions that they are not in the Federal Tort Claims Act. They agree to give up qualified immunity, which exists now under the Tort Claims Act, they have put in a strong disciplinary schedule to punish people --

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, counsel.

(Whereupon, at 12:00 o'clock noon, the court was in recess, to reconvene at 1:00 o'clock p.m.)

AFTERNOON SESSION -- 1:00 O'CLOCK P.M.

MR. CHIEF JUSTICE BURGER: Counsel, you may resume.

MR. DEUTSCH: Mr. Chief Justice, and may it please the Court --

MR. CHIEF JUSTICE BURGER: You have about five minutes remaining.

MR. DEUTSCH: Thank you, sir.

As to the question of Robertson v. Wegmann, the subject of the survival in the case was death caused by an extraneous cause, not by the actual claim brought. In other words, the person didn't die as a result of the claim. The claim was brought and the person died later on and that question was left directly open.

Also, the Lousiana statute, which was the subject of the survival case in Robertson allowed for many people to bring the action, including parents. So if we were operating under the Louisiana statute here, Joe Jones could bring a claim. The problem with Indiana, nobody can bring a survival claim.

QUESTION: But the claim couldn't be brought in Robertson at all, could it, because there just didn't happen to be that kind of a person around.

MR. DEUTSCH: Right, there was nobody. But there was a lot of different people who could have brought the

claim, including parents.

As to the question of congressional intent and exclusivity, every time the Congress has wanted the FTCA to be exclusive they have specifically stated in the act or in amendments -- and I refer the Court to 28 U.S.C. 2679 --

QUESTION: But that doesn't necessarily answer the question of whether the Court should imply a cause of action.

MR. DEUTSCH: No, not necessarily but it is important to look to congressional intent to determine whether --

QUESTION: And the other reason for not implying it maybe, if they thought it should be exclusive, but it is not the only reason for not having an implied action.

MR. DEUTSCH: No. I would think, whether there is an equally effective remedy is the real question. But in talking about congressional intent, not only did they specifically state so when they wanted it to be exclusive as to a Bivens claim, the 1974 amendments specifically recognizes that Bivens -- it is a counterpart to Bivens, and the Senate report specifically says that.

The other thing about congressional intent is that Congress is in fact involved in negotiations with the Justice Department about making it exclusive, and in the

course of that there are all kinds of broad changes being made in the act so it will take up the question of deterrence and compensation. Both the government and the Congress have both agrees that as it exists now the FTCA is not equally effective.

QUESTION: You've spoken three or four times about its being equally effective. I assume you mean would be the most productive in terms of the survivors, is that what you mean?

MR. DEUTSCH: I would say would create a remedy that could redress the loss suffered by the decedent in this case.

QUESTION: Well, as a practical matter -- and I suppose this is anyone's judgment -- wouldn't a judgment for, say, $50,000 against the United States government be worth considerably more than a judgment in a much larger amount against four or five civil servants?

MR. DEUTSCH: Well, it would maybe address the question of compensation, but the question of deterrence which is one of the twin goals of suing under the Constitution would not be accomplished because there is no deterrence to these men who have committed these violations of citizens' constitutional rights.

The question of common law of survival, if the Court looks at the Fifth Amendment, which says no one

shall be deprived of life without due process of law, how else could someone sue for damage, for the deprivation of life under the Fifth Amendment if there wasn't in effect some recognition that there had to be some common law of survival? What you are saying, if you apply Indiana law, is there is a constitutional violation if the person lives but if the person dies there isn't. That seems to fly right into the face of the Fifth Amendment.

QUESTION: Of course, many statutes produce that result, do they not?

MR. DEUTSCH: Your Honor, probably, but when we are talking about the enforcement of fundamental rights under the Fifth and Eighth Amendments, I would think a statute --

QUESTION: Sometimes the rights, the difference between the constitutional right and the statutory right in all practical terms are virtually indistinguishable, are they not?

MR. DEUTSCH: That would be true, and 1983 certainly enforces the constitutional rights. But if we don't have such a statute here, we have a statute that is based on state negligence law, and when we are talking about enforcing constitutional rights it is not adequate.

I also address the Court to 28 U.S.C. 2676 of the Tort Claims Act which recognizes that if you get a

recovery against the government you cannot sue against the individual employee, which recognizes that they are coexhisting remedies but you can't get double recovery. So if you go under the Tort Claims Act, you are precluded from going against the individual employee which imports of recognition you could choose either one, depending on what you thought was your interest in terms of deterrence and compensation.

Two other points I would like to make --

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Deutsch.

MR. DEUTSCH: All right. Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Geller?

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,
ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. GELLER: One point, Mr. Chief Justice.

The situation in this case is not at all like Bivens. In Bivens, there was absolutely no federal remedy because Congress hadn't amended the Tort Claims Act yet to include intentional torts.

Secondly, the Court said in Bivens that state treaspass and invasion of privacy laws were not adequate to compensate victims of Fourth Amendment violations because such state laws were often inconsistent or even

hostile to the interests protected by the Fourth Amendment.

The respondent here has never alleged much less shown why state malpractice laws are not adequate to compensate for the sorts of violations and injuries that occurred here.

QUESTION: Well, that was a great deal of the thrust of his argument this morning.

MR. GELLER: I don't --

QUESTION: What do you mean, he never alleged it?

MR. GELLER: I don't believe he --

QUESTION: That is what he was referring to all morning.

MR. GELLER: I don't believe that the respondent has shown what in Indiana in the peculiarities of Indiana malpractice law prevents full compensation for the sorts of injuries alleged in the complaint. We think that this is the sort of a case that the Court had in mind in Carey v. Piphus when it said that in some cases the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right. Here we think there is that parallel and therefore we don't think the Court should extend the implied constitutional damages action of Bivens.

QUESTION: Mr. Geller, do you think the implied

Bivens type constitutional remedy survived the enactment of the amendment of the Federal Tort Claims Act, made that type suit available --

MR. GELLER: You mean Bivens, the actual Bivens sort of action?

QUESTION: Yes, the Bivens itself.

MR. GELLER: Yes, that is a question I think quite similar to the one Mr. Justice White asked me. I think our argument if accepted might lead to that result but it needn't because of what I just said, the state laws that would be picked up in the Tort Claims Act to cover treaspasses or the sorts of invasions in Bivens. The Court said in Bivens were not adequate frequently to protect the Fourth Amendment interests at stake, and I think this might have been what Congress had in mind in the legislative history of the '74 amendments.

QUESTION: Mr. Geller, suppose there had been no Federal Tort Claims Act and there was a Bivens action brought, would you argue that just the existence of a malpractice remedy in Indiana would foreclose a --

MR. GELLER: No. No, there has to be we think a federal remedy.

QUESTION: There has to be an alternative remedy under federal law.

MR. GELLER: Absolutely, that is our position,

and there is here.

QUESTION: Why, pray tell?

MR. GELLER: Because this is a federal --

QUESTION: There is an adequate remedy under state law, then why would you imply one?

MR. GELLER: It is a federal constitutional right and we think that people who have that right violated should be entitled to a remedy in federal court. That was what --

QUESTION: The only remedy under the Federal Tort Claims Act is going to be by reference to the Indiana law.

MR. GELLER: But that is what Congress has chosen to do, but it is still a federal remedy.

QUESTION: Well, you say then that your own client ought to be suable.

MR. GELLER: Congress we think has made that judgment in cases like this, that's correct, and we don't think in that situation there is any need for this Court to extend the implied constitutional damage action that it recognized in Bivens.

QUESTION: Extend it, you mean extend it to this case?

MR. GELLER: Extend it to a situation where there is an adequate --

QUESTION: A case by another name, is that what you mean by extending it?

MR. GELLER: Extend it to a situation that didn't exist in Bivens which is that where there is a federal statutory remedy that is fully adequate.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:09 o'clock p.m., the case in the above-entitled matter was submitted.)

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